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In the Supreme Court

of the

United States

OCTOBER TERM, 1965

No. 269

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, and NORTHERN CALIFORNIA SMALL BUSINESS INVESTMENT COMPANY, a corporation,
Petitioners

vs.

FIRST NATIONAL BANK OF OAKLAND, a National Banking Association

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Three

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In the Supreme Court
of the
United States

October Term, 1965

No. .....

Superior Court of the State of California, County of Santa Clara, and Northern California Small Business Investment Company, a corporation,
Petitioners

vs.

First National Bank of Oakland, a National Banking Association

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Three

Petitioners pray that a writ of certiorari issue to review the order of the District Court of Appeal of the State of California, First Appellate District, Division Three, annulling an *ex parte* temporary restraining order of the Superior Court of Santa Clara County and the order adjudging the First National Bank of Oakland in contempt for violation thereof.

OPINIONS BELOW

The unmodified opinion of the District Court of Appeals is unofficially reported at 240 A.C.A. 110; and at 49 Cal. Rptr. 358. The opinion as modified is contained herein in Appendix A, *infra*.

The order of the Superior Court of Santa Clara County is unreported and is contained herein in Appendix B, *infra*.

JURISDICTION

The opinion and order of the District Court of Appeal was entered on February 10, 1966, and the opinion was modified on March 11, 1966. A timely petition for rehearing was denied on March 11, 1966. A timely petition for hearing by the Supreme Court of California was denied on April 5, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code § 1257(3).

QUESTIONS PRESENTED

1. Whether that provision of 12 U.S. Code § 91 of the National Bank Act which prohibits a state court from issuing an injunction against a national banking association prior to final judgment in any suit, action or proceeding, deprives petitioner Northern California Small Business Investment Company of rights protected by the "due process" clause of the Fifth Amendment.

2. Whether the provision of 12 U.S. Code § 91 prohibiting a state court from issuing an injunction prior to final judgment was repealed by the Act of July 12, 1882, Chap. 290, § 4, 22 Stat. 163.

3. Whether in an action involving a national banking association, a state court has power to preserve existing conditions and to protect its jurisdiction pending a hearing

and determination of the facts and law, including the applicability of 12 U.S. Code § 91, and its authority to grant injunctive relief.

4. Whether the provision of 12 U.S. Code § 91, prohibiting the issuance of an injunction by a state court prior to final judgment applies where a national banking association is holding property for another as a trustee.

5. Whether the provision of 12 U.S. Code § 91 prohibiting a state court from issuing an injunction prior to final judgment deprives the state court of jurisdiction to issue injunctions before final judgment or merely confers an immunity upon national banks which can be waived.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 91 of Title 12, of the United States Code, a provision of the National Bank Act, provides:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of

judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. R.S. § 5242.

STATEMENT

Petitioner Northern California Small Business Investment Company as beneficiary under a deed of trust on real property commenced a foreclosure action on August 23, 1965, after default upon a promissory note secured thereby. First National Bank of Oakland as beneficiary of other deeds of trust on the same property was joined as a defendant because of a dispute as to the validity of the bank's deeds of trust, their lien priority and the amount of the lien which they secured. (R: Complaint, para. 12-18; Exh. 1 to Answer to Bank's Petition)

After reviewing the verified complaint, the trial court issued an *ex parte* temporary restraining order prohibiting the bank from proceedings with private trustee's sales under its deeds of trust, then scheduled for 10:00 a.m. and 10:30 a.m. on August 25, 1965. (R: Restraining Order; Exh. B to Bank's Petition). At this time the bank was both beneficiary and trustee under its deeds of trust, having substituted itself as trustee shortly before in place of a California corporation. (R: Hollander Declaration, para. 9, 11).

After having been served with the temporary restraining order on August 24, 1965, an official of the bank telephoned the presiding judge of the trial court and questioned the validity of the restraining order under federal law. The court requested that the bank file a declaration that it was a national banking association and that all parties appear in chambers on August 25, 1965, at 9:15 a.m., at which time the court would consider a petition to dissolve the restraining order. (R: Order Re Contempt, para. 7; Exh. D to Bank's Petition; Appendix B, *infra,* pp. 6-7).

On August 25, 1965, counsel for all parties apeared in chambers at 9:15 a.m. The bank filed its declaration and requested that the restraining order be dissolved in light of 12 U.S. Code § 91. The court advised the bank that it had commitments to numerous litigants then assembled in the courtroom and requested that the bank as trustee postpone the sales until 12 o'clock noon, a period of two hours, to permit the court to dispose of its prior commitments and then to hear and consider the bank's request. Although the bank acknowledged that it had the power, it refused to postpone the sales until 12 o'clock so as to permit the court to determine the applicable law. Counsel for the bank, who was also its Secretary, stated that it would proceed with the sales and that the court had no power to restrain the sales. The court thereupon denied the request of the bank to dissolve the restraining order and declared that the order would remain in full force and effect. (R. *Ibid,* para. 8; Appendix B, *infra,* pp. 7-8).

The bank thereupon proceeded to conduct and participate in the trustee's sales and bid in the property. (R: *Ibid,* para. 9-10; Appendix B, *infra,* p. 8).

After hearing on an order to show cause, the court expressly found:

> "At all times subsequent to the entry of the Temporary Restraining Order on August 23, 1965, it has remained in full force and effect, and defendant First National Bank of Oakland at the time of said sales and at all relevant times herein had full ability to comply with the terms and conditions thereof. At the time of the violation of the terms and conditions thereof, defendant First National Bank of Oakland had full knowledge of the terms and conditions of said Temporary Restraining Order and wilfully disobeyed the terms and conditions thereof, and did so with the conscious intention of frustrating the process of this Court, to interfere with its jurisdiction, and to deprive the Court of the subject *res* of the action and the opportunity to determine the controversy on the merits." (R: *Ibid,* para. 11; Appendix B, *infra,* pp. 8-9).

The bank was adjudged to be in contempt of court and fined $500.00. (R: *Ibid,* para. 1; Appendix B, *infra,* p. 10).

The District Court of Appeal issued a writ of review and alternative writ of prohibition, and after hearing, annulled the temporary restraining order and the order adjudging the bank in contempt. Its decision was based solely on its interpretation of 12 U.S. Code § 91 as barring interim injunctive relief before final judgment in state courts against any national bank. (R: Opinion; Appendix A, *infra*).

> "The trial court acted beyond its jurisdiction in issuing the temporary restraining order. Since that order must fall, all contempt proceedings based upon its violation must fall with it." (R: *Ibid;* Appendix A, *infra,* p. 2).

A timely petition for rehearing was denied on March 11, 1966 (R: Order of March 11, 1966), and a timely petition for hearing by the California Supreme Court was denied on April 5, 1966. (R: Order of April 5, 1966).

REASONS FOR GRANTING THE WRIT

I. The Statute as Interpreted by the District Court of Appeal Deprives Petitioner of Federal Constitutional Rights Protected by the Fifth Amendment

Although the provision of 12 U.S. Code § 91 which prohibits a state court from issuing an injunction against a national banking association prior to final judgment has been part of the National Bank Act since 1873 (Act of March 3, 1873, c. 269 § 2; 17 Stat. 603), its constitutionality and scope have not yet been determined by this Court.

Except for cases involving diversity of citizenship or a federal question, the federal courts have no jurisdiction over suits against national banking associations, and litigants must resort to the state courts. (28 U.S. Code § 1348, *Continental National Bank v. Buford*, 191 U.S. 119, 123-24).

As to that class of litigants including petitioner who, pursuant to law, can sue national banks only in state courts, the interpretation of the statute by the District Court of Appeal is so broad as to place national banks above the law and to deprive such litigants of due process. Regardless of the harm threatened, the merits of the controversy or the equities involved, state courts are powerless to preserve the status quo and to restrain improper and unlawful acts by national banks prior to final judgment. National banks are free to commit waste or irreparable harm to the rights and property of litigants or to remove the property from the jurisdiction of the court so as to prevent and frustrate any effective relief. The trial court herein expressly found that defendant bank in wilfully violating the terms of the temporary restraining order:

> ". . . did so with the conscious intention of frustrating the process of this Court, to interfere with its jurisdiction, and to deprive the Court of the subject *res* of the action and the opportunity to determine the controversy on the merits." (Appendix B, *infra*, p. 9).

Yet the District Court of Appeal held that because of 12 U.S. Code § 91, the trial court was powerless and without jurisdiction to prevent such acts or to protect petitioner or its own jurisdiction. Under such circumstances, the remedy afforded by state courts is so inadequate as to be a denial of due process.

The statute also creates an unjustifiable discrimination. Thus litigants in cases involving diversity of citizenship or a federal question can resort to the federal courts and obtain a temporary restraining order or preliminary injunction, whereas litigants in other cases must resort to the state courts which are powerless to render such interim relief.

As interpreted by the District Court of Appeal, the statute results in the deprivation of constitutionally protected rights in violation of the Fifth Amendment.

In *Truax v. Corrigan,* 257 U.S. 312, a state statute prohibiting the issuance of restraining orders or injunctions in labor disputes was held to violate the due process and equal protection clauses of the Fourteenth Amendment, where, as here, the statute was construed by the lower court as depriving a property owner of any real remedy for wrongful and injurious invasion of his property rights.

> "It is true that no one has a vested right in any rule of the common law, but it is also true that the legislative power of a state can only be exercised in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with these principles." (*Ibid,* 257 U.S. at 329-330).

> "If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction." (*Ibid,* 257 U.S. at 334).

Although the Fifth Amendment does not contain an equal protection clause, this Court has held that discrimination may be so unjustifiable as to constitute a violation of due process. (*Bolling v. Sharpe,* 347 U.S. 497).

Thus, 12 U.S. Code § 91 as construed by the District Court of Appeal results in a deprivation of due process in violation of the Fifth Amendment. The decision of the District Court of Appeal should be reversed.

II. The Provision of 12 U. S. Code § 91 Prohibiting a State Court from Issuing an Injunction Prior to Final Judgment Was Repealed by the Act of July 12, 1882, Chap. 290, § 4, 22 Stat. 163

The provision of 12 U.S. Code § 91 was adopted in 1873 at the time when federal and state courts had concurrent jurisdiction of suits against national banks. At that time federal courts could issue injunctions prior to final judgment. (*Pacific National Bank v. Mixter,* 124 U.S. 721, 727).

In 1882, Congress took away from federal courts jurisdiction over suits by or against national banks solely because they were national banks. (Act of July 12, 1882, Chap. 290, § 4, 22 Stat. 163). Said Act provides in part:

> "[T]he jurisdiction for suits hereafter brought by or against any association . . . shall be the same and not other than, the jurisdiction for suits by or against banks not organized under any law of the United

> States . . . And all laws and parts of laws of the United States inconsistent with this provision be, and the same are hereby, repealed."

This Court has heretofore interpreted this provision as merely withdrawing jurisdiction from federal courts. (*Continental National Bank v. Buford,* 191 U.S. 119, 123). Recently, however, this Court has had occasion to review the legislative history and purpose for this provision of the Act of 1882. (*Mercantile National Bank v. Langdeau,* 371 U.S. 555, 565-67). The purpose of the law as stated in Congress was:

> ". . . that the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a State bank actually doing business or what might be doing business by its side; that they shall be one and the same."
>
> ". . . a national bank doing business within a certain State shall be subject for all purposes of jurisdiction to precisely the same regulations to which a State bank, if organized there, would be subject."

(13 Cong. Rec. at 4049, quoted in *Mercantile National Bank, supra,* 371 U.S. at 566, fn. 22).

In light of its legislative history and purpose, it is submitted that this provision of the Act of 1882 was intended to repeal the prohibition against injunctions by state courts before final judgment and to restore to state courts the power to issue such injunctions against national banks to the same extent that injunctions could be issued against state banks.

By such an interpretation of the Act of 1882, the constitutional objections raised above would be overcome and a statutory construction of the National Bank Act consistent with the due process clause of the Fifth Amendment could be effected.

III. Even if the Statute is Constitutional, a State Court Has Power to Preserve Existing Conditions and to Protect Its Jurisdiction Pending Its Determination of Applicable Law

Even if the construction placed upon the statute by the District Court of Appeal is otherwise correct, the court erred in holding that the statute deprived the trial court of the power to preserve existing conditions pending its determination of applicable law. The court in effect sanctions a litigant taking the law into his own hands and making his own independent determination of the power of the court to restrain him.

Such an interpretation of anti-injunction statutes has been rejected by this Court. (*United States v. United Mine Workers,* 330 U.S. 258).

> "In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt," (*Ibid,* 330 U.S. at 293).

Further, since this is an *in rem* action, the trial court having acquired jurisdiction over the *res* can protect its jurisdiction and prevent interference therewith. (*Princess Lida v. Thompson,* 305 U.S. 456, 466; *State v. Superior Court for King County,* 222 Pac. 203 (S. Ct. Wash.).

The temporary restraining order was therefore valid, and the bank's violation thereof was a contempt of court. The decision of the District Court of Appeal annulling the contempt is contrary to applicable decisions of this Court and should be reversed.

IV. The Statute Does Not Apply Where the Bank Is Holding Property for Another as Trustee

In attempting to foreclose its deeds of trust, the defendant bank was acting both as trustee and beneficiary under its deeds of trust. Under California law, as trustee, it held the property in trust not only for itself as beneficiary, but for the owners as well. (*Atkinson v. Foote,* 44 Cal. App. 149, 156-57).

In construing the attachment provision of 12 U.S. Code § 91, this Court expressly declared that it did not prevent an attachment against a national bank as garnishee.

> "Whatever may be the scope of § 5242, an attachment sued out against the bank as garnishee is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others."
>
> *Earle v. Pennsylvania,* 178 U.S. 449, 453-54.

Consistent with *Earle,* a state court in construing the injunctive provision of the statute declared that it did not prevent a preliminary injunction from issuing against a national bank to reach or control property held by the bank or in its possession for the special and peculiar benefit of another party. (*Drewes v. Ham & Seymour,* 103 So. 241 (S. Ct. La.)).

The interpretation by the District Court of Appeal is in conflict with the principle of the *Earle* and *Drewes* cases, for the court interprets the statute as barring interim injunctive relief in all state courts regardless of the capacity of the bank. This issue is of great public importance, for national banks frequently act as trustees and custodians of property for the benefit of third persons and the question of whether and to what extent national banks are subject to interim injunctions by state courts when acting in such capacity should be resolved by this Court.

V. The Provision of 12 U. S. Code § 91 Prohibiting Injunctions Prior to Final Judgment Does Not Deprive the Court of Jurisdiction to Issue an Injunction but Merely Confers an Immunity on a National Bank Which Can Be Waived

This Court has held that the type of anti-injunction statute contained in 12 U.S. Code § 91 does not deprive the court of jurisdiction but merely goes to the question of equity in the particular case.

> "The jurisdiction thus acquired was not taken away by § 265 of the Judicial Code, providing that except in bankruptcy cases, 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.' This section does not deprive a district court of jurisdiction otherwise conferred by the Federal statutes, but goes to the question of equity in the particular bill; making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which the relief by injunction is prohibited by this section or may nevertheless be granted."
>
> (*Sovereign Camp, Woodmen of the World v. O'Neill*, 266 U.S. 291, 298).

Where Congress intends to deprive a court of jurisdiction to issue an injunction, it has so specified. (See for example Norris-LaGuardia Act, 29 U.S. Code § 101).

Thus the injunction provision of 12 U.S. Code § 91 should be construed as merely an immunity given to national banks. It has been so construed by state courts which have found that a national bank waived the immunity conferred by the statute in circumstances similar to those herein. (*State v. Superior Court for King County*, 222 Pac. 203 (S. Ct. Wash.)); *Loew's Inc. v. Superior Court*, 301 P.2d 64 (D.C.A. Calif. Dismissed after Petition for Hearing granted by California Supreme Court).

The question of whether the injunction provision of 12 U.S. Code § 91 can be waived has never been determined by this Court and is a matter of great public interest and should be decided.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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STATEMENT UNDER RULE 33(2) (b)

Since the proceedings draw into question the constitutionality of 12 U.S. Code § 91, R.S. 5242 an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that Title 28 U.S. Code § 2403 may be applicable.

(Appendices Follow)

Appendix A

(Title of Court and Cause)

Filed: Feb 10 1966
Modified: March 11, 1966
Lawrence R. Elkington, Clerk
By ....., Deputy

1 Civil No. 23250

Petitioner is a national banking association. It and real party in interest are beneficiaries of separate deeds of trust upon all or part of the same property. Defaults occurred under both deeds, and the beneficiaries differed as to their respective priorities.

Real party filed an action in the Superior Court. That Court issued temporary restraining order prohibiting sale by petitioner under its deed of trust. Petitioner's request for dissolution of the order was heard shortly before the scheduled hour of sale. The court asked petitioner to postpone the sale for two hours to permit completion of other matters already set and to review petitioner's authorities. The request was denied and the court then refused to dissolve its restraining order. Petitioner nonetheless conducted the sale under the deed of trust, and bid in the property. After hearing on an order to show cause, the court held petitioner in contempt and assessed fine of $500. It also vacated the sale. Upon petition, writ of review and alternative writ of prohibition issued.

Federal statute provides that "no attachment, injunction, or execution, shall be issued against (a national banking association) or its property before final judgment in any * * * action * * * in any State * * * court" (12 U.S.C.A. § 91).

Although the earlier clauses of the same section deal with insolvent banks, the legislative history makes clear that this qualification does not limit the last clause, that quoted above. The proscription of state court attachment or injunction before final judgment "is by no means confined to cases of actual or contemplated insolvency." Rather, it bars the interim remedy in state courts as to any national bank (*Pacific National Bank v. Mixter*, 124 U.S. 721, 727; see also *Dennis v. First Nat. Bank of Seattle*, 127 Cal. 453). It should be noted that assets of another in possession of such a bank, are not immune to garnishment in an action against their owner. (*Earle v. Pa.*, 178 U.S. 449, 454).

Real party argues that a temporary restraining order is not an injunction. But California has long recognized the substantial identity of the two in such jurisdictional matters as the right of appeal (*Neumann v. Moretti*, 146 Cal. 31; *Laam v. McLaren*, 28 Cal. App. 632). Recognition of procedural distinctions between the two, as in express statutes requiring a bond for one but not the other (*Neumann v. Moretti*, supra), does not aid real party. The federal statute bars any injunction before final judgment, and to seek to sustain interim injunctive relief because of the name given it by the state would be but to quibble with the clear federal purpose.

The trial court acted beyond its jurisdiction in issuing the temporary restraining order. Since that order must fall, all contempt proceedings based upon its violation fall with it.

The order vacating the sale, however, is not similarly affected. Except for a limited area reserved to the federal courts, general jurisdiction over actions by or against national banks is expressly conferred upon the state courts

(28 U.S.C.A. § 1348; see *Continental National Bank v. Buford,* 191 U.S. 119, 123-4). Vacation of this sale is not within the subject matter reserved to the federal jurisdiction. Nor is the remedy one barred to state courts by section 91.

This decision is in no way critical of the trial judge. The rule of section 91 is little known in the California practice and seems seldom resorted to by the many national banks of this state. It is difficult to understand counsel's rejection of the judge's eminently reasonable request for a two-hour postponement of sale to permit review of petitioner's authorities. We are bound, however, by the federal statute barring interim injunctive relief in all state courts.

The temporary restraining order and the order adjudging petitioner in contempt for its violation are annulled. Since this remedy suffices, the alternative writ of prohibition is discharged.

Draper, P. J.

We concur:

Salsman, J.

Devine, J.

Appendix B

Filed—Nov 1 1965
Paul R. Teilh, Clerk

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In the Superior Court of the State of California in and for the County of Santa Clara

No. 170705

Northern California Small Business Investment Company, a corporation,
Plaintiff,

v.

First National Bank of Oakland, a corporation, et al.,
Defendants.

SUPPLEMENTAL AND AMENDED ORDER

The above-entitled matter having regularly come on for hearing before this Court pursuant to an Order to Show Cause Why C. Jay Hollander, First National Bank of Oakland, a corporation, and each of them, should not be held in Contempt, and why the purported trustee's sale by First National Bank of Oakland should not be cancelled and set aside, and plaintiff appearing by its counsel, Roger

L. Mosher and William I. Cohen, and defendant First National Bank of Oakland appearing by its counsel, C. Jay Hollander and Irving J. Kornfield, and C. Jay Hollander appearing on his own behalf, and the Court having studied the affidavits, briefs and other documents on file herein, and having heard argument, and being fully advised, the Court finds as follows:

1. This Court has jurisdiction of the subject matter of this action and of the parties thereto. The Complaint, the Temporary Restraining Order and Order to Show Cause of August 23, 1965, the Order to Show Cause in re Contempt and to Set Aside Trustee's Sale of August 27, 1965, and the affidavits, documents, records and files in the above-entitled action state claims and facts upon which relief may be granted and upon which defendant First National Bank of Oakland may be held in Contempt of Court, under the laws of the State of California.

2. On August 23, 1965, the verified Complaint instituting the present action was filed herein.

3. After having read said verified Complaint and having studied the Memorandum of Points and Authorities filed therewith, and after due deliberation, the Court determined that this was a proper case for the issuance of a Temporary Restraining Order and in order to maintain the status quo, the Court assumed jurisdiction of the parties and the subject matter and issued its Temporary Restraining Order on August 23, 1965. Said order provided, among other things, that:

> "Defendants First National Bank of Oakland, Transamerica Title Insurance Company and Statewide Contractors Service, Inc., and each of them, their agents, servants, employees and representatives, be and they are hereby restrained and enjoined from performing, directly or indirectly, any or all of the following acts:
>
> • • • • • • •

"(b) Conducting or causing to be conducted, or participating in any trustee's sale of the property described herein, or any part thereof."

The Order to Show Cause issued in connection therewith provided that the matter should be heard on September 7, 1965.

4. The property described in plaintiff's Complaint on file herein and referred to in said Temporary Restraining Order is situate in the City of Sunnyvale, County of Santa Clara, State of California, and is described as follows:

"ALL OF LOTS 10 and 11, as shown upon that certain Map entitled 'TRACT NO. 3358 MARCIA LYNN TERRACE RESUBDIVISION', which Map was filed for record in the office of the Recorder of Santa Clara County, State of California, on November 7, 1962, in Book 154 of Maps, page 24."

6. Defendant First National Bank of Oakland, a corporation, has at all times had actual notice and knowledge of the making of the Temporary Restraining Order, and of its terms, and said defendant was duly served with a copy of said Temporary Restraining Order after having been shown the original thereof at Oakland, California, on August 24, 1965, as is more particularly set forth in the Affidavit of Service attached to the original thereof which is on file herein.

7. On August 24, 1965, after having been served with a copy of the Temporary Restraining Order, C. Jay Hollander, Secretary of and counsel for defendant First National Bank of Oakland, telephoned Judge John T. Racenelli, who was at that time Presiding Judge of the above-entitled Court, and questioned the validity of the Temporary Restraining Order in light of certain federal

statutes. The Court thereupon requested defendant First National Bank of Oakland to file a declaration to the effect that it was a National Banking Association and requested counsel for all parties to appear in Chambers at 9:15 A.M. on the following morning, August 25, 1965, at which time the Court would entertain a petition to dissolve the Temporary Restraining Order.

8. On August 25, 1965, at 9:15 A.M., counsel for all parties appeared in Chambers of the Presiding Judge, John T. Racanelli. At that time, defendant First National Bank of Oakland filed its declaration that it was a National Banking Association and requested that the Temporary Restraining Order be dissolved in light of 12 U.S.C. § 91. The Court advised defendant First National Bank of Oakland that as Presiding Judge, the Court had commitments to numerous litigants who were then assembled in the courtroom. The Court thereupon asked whether defendant First National Bank of Oakland as trustee had power to postpone the trustee's sales which were then set for 10:00 A.M. and 10:30 A.M. until 12 o'clock noon. Defendant First National Bank of Oakland thereupon advised the Court that it did have such power. Whereupon the Court requested that since this matter had not been regularly calendared, defendant First National Bank of Oakland, as trustee, postpone the sales until 12 o'clock noon, a period of two hours, to permit the Court to dispose of its prior commitments and then to hear and consider the request of defendant First National Bank of Oakland to dissolve said Temporary Restraining Order. Defendant First National Bank of Oakland thereupon refused to postpone said trustee's sales so as to permit the Court to determine the applicable law, and stated that it would proceed with the sales and the Court had no power to restrain the sales.

Whereupon the Court denied the request of defendant First National Bank of Oakland to dissolve said Order and declared that the Temporary Restraining Order would remain in full force and effect.

9. On August 25, 1965, between the hours of 10:00 A.M. and 10:35 A.M., defendant First National Bank of Oakland, by and through its Secretary, C. Jay Hollander, acting as trustee under the deeds of trust described in plaintiff's complaint proceeded to conduct a trustee's sale of the property described herein at the San Jose offices of Transamerica Title Insurance Company.

10. At said time and place, defendant First National Bank of Oakland, as beneficiary under said deeds of trust, appeared through its Secretary, C. Jay Hollander, and bid the sum of $281,249.26 as to Lot 10 and the sum of $281,247.01 as to Lot 11 of the above-described property, and defendant First National Bank of Oakland, as trustee, by its secretary, C. Jay Hollander, purported to confirm said sales of said property to defendant First National Bank of Oakland. On or about August 26, 1965, defendant First National Bank of Oakland, as trustee, purported to convey to defendant First National Bank of Oakland the property described herein, which trustee's deeds were recorded in the office of the County Recorder of Santa Clara County on August 30, 1965 in Book 7087 at pages 278 and 281.

11. At all times subsequent to the entry of the Temporary Restraining Order on August 23, 1965, it has remained in full force and effect, and defendant First National Bank of Oakland at the time of said sales and at all relevant times herein had full ability to comply with the terms and conditions thereof. At the time of the violation of the terms and conditions thereof, defendant First Na-

tional Bank of Oakland had full knowledge of the terms and conditions of said Temporary Restraining Order and wilfully disobeyed the terms and conditions thereof, and did so with the conscious intention of frustrating the process of this Court, to interfere with its jurisdiction, and to deprive the Court of the subject *res* of the action and the opportunity to determine the controversy on the merits.

12. At the time of said sales there was a controversy between plaintiff and defendant First National Bank of Oakland concerning the amount of defendant Bank's lien in the property, and whether it had any lien at all in Lot 10 of said property. Knowing of this controversy and in utter disregard of the protests and objections of plaintiff, defendant First National Bank of Oakland nevertheless proceeded with said sales.

13. The acts of defendant First National Bank of Oakland thru its Secretary, C. Jay Hollander, as set forth hereinabove, were wilful and deliberate violations of the Order of this Court of August 23, 1965, and constituted Contempt of this Court.

14. On August 23, 1965, plaintiff was advised by its Counsel that this Court had issued a Temporary Restraining Order against defendants enjoining and restraining the private foreclosure sales scheduled for August 25, 1965. On August 24, 1965, plaintiff was further advised by its Counsel that said Order had been served upon defendant First National Bank of Oakland and defendant Transamerica Title Insurance Company, which plaintiff understood at that time to be trustee under said deeds of trust. In reliance upon said Temporary Restraining Order, plaintiff did nothing further to protect its interest in the property, nor did it appear at the purported foreclosure sale which took place on August 25, 1965 in violation of said Restraining Order.

15. No finding is made as to whether or not C. Jay Hollander as an individual is guilty of Contempt of this Court.

16. In order to restore the parties to their respective positions just prior to the purported trustee's sale made in violation of the Restraining Order of August 23, 1965, to protect the jurisdiction of the Court over the property, the subject *res* of this action, to preserve the *status quo* pending further order of this Court, and in the best interests of the parties hereto and of all persons claiming any interest in the property, the purported trustee's sale should be vacated, set aside and declared to be null and void.

Wherefore, It Is Ordered, Adjudged and Decreed that:

1. Defendant First National Bank of Oakland is, and hereby is adjudged to be, in Contempt of Court and is hereby fined in the amount of $500.00, provided that a stay of execution is granted with respect to payment of said fine to November 5, 1965.

2. The trustee's sales by defendant First National Bank of Oakland on August 25, 1965, of the property described as follows:

> "ALL OF LOTS 10 and 11, as shown upon that certain Map entitled 'TRACT NO. 3358 MARCIA LYNN TERRACE RESUBDIVISION', which Map was filed for record in the office of the Recorder of Santa Clara County, State of California on November 7, 1962, in Book 154 of Maps, page 24."

be and the same hereby are vacated, set aside and declared to be invalid, null and void, effective upon the entry of this Order.

3. Those certain trustee's deeds executed on or about August 26, 1965, by defendant First National Bank of

Oakland, as Trustee, conveying to defendant First National Bank of Oakland the property hereinabove described and which trustee's deeds were recorded in the office of the County Recorder of Santa Clara County on August 30, 1965, in Book 7087 at page 278 and page 281 be and the same are hereby declared invalid, null and void, and are vacated and cancelled, effective upon the entry of this Order.

4. The status and condition of said property be restored to that which existed on August 25, 1965, immediately prior to the trustee's sales by defendant First National Bank of Oakland and that said status of said property as it existed prior to said sale shall be maintained until such time as the Court shall have ruled upon defendant's Motion for Change of Venue and plaintiff's Motion for a Preliminary Injunction, or until further order of this Court, effective upon the entry of this Order.

5. The parties herein, and all persons claiming an interest in the property, and each of them, hereby are and shall be forthwith restored to the exact status in terms of all right, title, interest and possession that each of them actually had and enjoyed immediately prior to the purported trustee's sale of August 25, 1965, effective upon the entry of this Order.

6. As a remedial measure, and in order to clear the title of record, defendant First National Bank of Oakland, at its sole cost and expense, shall execute and record all necessary documents so as to retore the record title to the property to defendant First National Bank of Oakland, as trustee, effective November 5, 1965, pursuant to a stay of execution of this paragraph of this Order granted by the Court.

7. Pending further order of this Court, defendants First National Bank of Oakland, Statewide Contractors Service, Inc., and each of them, their agents, servants, employees and representatives, be and they hereby are restrained and enjoined from noticing or conducting or causing to be conducted any trustee's sale of the property which is the subject of this action.

8. The Bond upon Restraining Order previously posted by plaintiff shall be increased to the sum of $15,000.

9. This Supplemental Order is intended merely to clarify and correct certain provisions of The Court's Order of October 13, 1965, and to extend the stay of execution granted therein.

Dated: Oct. 27, 1965

JOHN T. RACANELLI
Judge of the Superior Court